(1)

92-1625
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Petitioners,

v.

JOHN L. BAGWELL; CLINCHFIELD COAL CO.; and
SEA "B" MINING CO.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. STROPP, JR.
900 15th Street, N.W.
Washington, D.C. 20005

JOHN R. MOONEY
1341 G Street, N.W.
Washington, D.C. 20005

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
ANDREW P. MILLER
2101 L Street, N.W.
Washington, D.C. 20037

VIRGINIA A. SEITZ
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). *See also Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:

> Whether—as the Virginia Supreme Court held below, and as is the growing trend in the lower courts—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders?

2. In *Gompers v. Buck's Stove & Range Co., supra,* this Court—in passing on the claim that a civil contempt proceeding survived the settlement of the main civil case that generated the contempt proceeding—held that civil contempt proceedings, unlike criminal contempt proceedings, "necessarily end[] with the main cause": "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled." 221 U.S. at 451. Against this background, the second question presented here is:

Whether—as the Virginia Supreme Court held below, in agreement with one line of conflicting lower court decisions—a contempt proceeding may be treated as civil when it generates substantial non-compensatory contempt fines that survive the full settlement of the main civil case solely in order that the court is able to vindicate its own authority?

3. Whether the non-compensatory civil contempt fines of $52 million at issue here—analogous to the punitive damages at issue in *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, and the civil forfeiture at issue in *Austin v. United States* No. 92-6073—were so excessive as to violate the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court of Virginia is reprinted in the separately bound Appendix ("App.") to this *certiorari* petition at App. 1a-20a and published at 244 Va. 463, 423 S.E.2d 349. The decision of the Court of Appeals of Virginia is reprinted at App. 25a-37a and published at 12 Va. App. 123, 402 S.E.2d 899. The decisions and orders of the Circuit Court of Russell County, Virginia, are reprinted at App. 39a-121a and are not published.

JURISDICTION

The Supreme Court of Virginia entered its decision on November 6, 1992, and denied petitioners' timely petition for rehearing on January 8, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution are reprinted in relevant part at App. 124a.

STATEMENT OF THE CASE

1. This action arises from a strike by the members of International Union, United Mine Workers of America, and United Mine Workers of America, District 28 ("the Union"). The strike was called against two affiliated coal companies, Clinchfield Coal Co. and Sea "B" Mining Co. (the "Company"), on April 4, 1989, to protest the Company's unfair labor practices. On April 12, 1989, the Company filed a bill of complaint against the Union in the Circuit Court of Russell County, Virginia, alleging various unlawful strike-related activities—including actions of interference and intimidation by strikers and their supporters directed against those engaged in the Company's operations—and seeking to have the court enjoin the Union from engaging in such activities. The next day, April 13, 1989, the court granted the injunction.

On April 21, 1989, the court, upon the Company's Motion to Amend the Temporary Injunction, modified

and strengthened its injunction. The court restrained and enjoined the Union, its officers, agents, servants, employees and members from engaging or attempting to engage in numerous broadly framed categories of acts. App. 114a-115a.

On May 16, 1989, on the motion of the Company, the court held its first contempt hearing. As was the case in every contempt hearing below, the proceeding was conducted as a civil proceeding tried to the judge who had issued the injunction, rather than as a criminal proceeding (subject to the applicable requirements of the United States Constitution) tried to a jury.

At the May 16 hearing, the trial court found that there had been 72 separate violations of its previously entered injunctions—including 15 instances of violence, 43 instances of exceeding picket numbers, 10 instances of blocking ingress and egress to the Company's facilities, and 4 instances of technical violations of the amended injunction, and therefore fined the Union $440,000. App. 109a.

At this hearing, the court also established a prospective fine schedule for future violations. The schedule provided for fines of $100,000 for each future incident involving any violence in violation of the injunction, and $20,000 for each future incident not involving violence. In addition, these fines were to "double each day, without limitation." App. 111a.

On June 7, 1989, following another motion of the Company, the trial court held a second contempt hearing, found the Union in contempt, and imposed fines totalling $2,465,000. App. 102a.

For three days, July 19-21, 1989, the trial court held a third contempt hearing at the motion of the company. The court entered a third contempt order on July 27, 1989, which fined the Union a total of $4,465,000 (App. 97a), doing so despite admissions that the Company's own witnesses could not identify the individual or individuals accused of rock throwing and other acts. Indeed, the Company's own attorney conceded that the witness' testimony

was "kind of weak, not the strongest thing." Hearing Tr. (July 19, 1989), at 167.

On September 21, 1989, the trial court, at the motion of the Company, issued its fourth contempt order, imposing fines totalling $16,900,000. In this order, the court empowered the Company's attorneys to collect all those fines imposed on or after July 27, 1989, *i.e.*, all fines except those issued pursuant to the first two contempt orders. App. 83a.

On October 9, 1989, the fifth contempt order was issued, at the motion of the Company, imposing fines of $6,900,000. Specifically, the Union was held responsible for 71 separate counts of "violence" despite the fact that in 70 of these counts a perpetrator could not be identified.[1]

The sixth, seventh, and eighth contempt orders were entered in November and December, 1989, at the motion of the Company, imposing fines in the amount of $33,400,000.

As already noted, in all of these contempt proceedings, the contempts were treated as civil in nature, and the trial judge served as the sole trier of fact, while the Union was denied the various safeguards accorded to defendants in criminal contempt. In total, the trial court levied over $64,000,000 in fines against the Union.

2. The Union timely noticed appeals of the first five orders to the Virginia Court of Appeals where they were consolidated. (*"Clinchfield I"*). While this appeal was pending, the Company and the Union continued to negotiate to resolve their labor dispute and, on January 1, 1990, announced a full settlement of their labor dispute

[1] Even where testimony consisted only of a witness having seen a pair of hands throwing a rock, the Union was fined $100,000. App. 71a. In many instances, the Union was held responsible for actions on the sole basis that perpetrators were attired in camouflage clothing, which was treated as a striker "uniform." There are also cases where unidentified perpetrators were not so attired, and the Union was nonetheless held responsible and fined $100,000 for each incident. *See generally, e.g.*, Hearing Tr. (Oct. 4, 1989) at 166-89, 243-54.

with the help of a "super mediator" appointed by the United States Secretary of Labor. The agreement also specifically provided that the parties would dismiss all pending litigation and would have vacated all outstanding civil judgments, including the contempt fines. Accordingly, on January 24, 1990, the Company and the Union jointly moved the trial court to dismiss the Company's cause and vacate all uncollected contempt fines.

On September 11, 1990, the trial court granted the parties' motion to dismiss the Company's civil cause against the Union. Additionally, the court dissolved the injunctions and vacated those fines payable to the Company. However, the trial court refused to vacate the remaining $52,000,000 in fines and—in light of the dismissal of the underlying civil cause and the Company's motion to vacate the pending contempt fines—the court appointed John L. Bagwell as a special commissioner charged with defending and collecting those fines.

Shortly thereafter, Bagwell moved to intervene in *Clinchfield I*.

3. Following the September 11 decision of the trial court, the Union filed a second appeal seeking reversal of, *inter alia*, the sixth, seventh and eighth contempt orders, the order granting in part and denying in part the joint motion to vacate and dismiss, and the order substituting Bagwell as special commissioner. (*"Clinchfield II"*).

4. In an opinion and order dated March 26, 1991, the Virginia Court of Appeals decided *Clinchfield I*. The decision denied Bagwell's right to intervene and ordered that the fines imposed against the Union under the first five contempt orders be vacated. App. 34a-37a. The court of appeals, choosing to apply state law—and noting that, on its understanding, the state law parallels the applicable federal law—held that, even if the fines at issue were civil in nature, "civil contempt fines imposed during or as a part of a civil proceeding between private parties are settled when the underlying litigation is settled by the parties and the court is without discretion to refuse to vacate such fines." App. 36a.

5. Following this decision by the Virginia Court of Appeals, Bagwell, despite the denial of his request for party status, petitioned for appeal to the Supreme Court of Virginia. Specifically, Bagwell sought to appeal the denial of his petition to intervene and the vacation of the fines in light of the parties' settlement. The Union opposed the appeal and moved to dismiss. The Virginia Supreme Court deferred consideration of these motions.

On March 5, 1992, the Virginia Supreme Court granted Bagwell an appeal in *Clinchfield I*. At the same time, that court certified *Clinchfield II*, which had been fully briefed and argued and was pending appeal in the Virginia Court of Appeals. The two cases were then treated as consolidated.

In a decision dated November 6, 1992, the Virginia Supreme Court noted that the Union had appealed the underlying contempt orders, "contend[ing] that the fines are criminal in character and, therefore, are invalid because they were imposed without the mandated constitutional protections." App. 12a. That court rejected that contention holding that the fines at issue were not criminal in nature, but rather were civil in nature. App. 15a-16a.

The Virginia Supreme Court also rejected the Union's argument that under federal and state law these fines, if civil, must be vacated as a consequence of the full settlement of all disputes between the parties, explaining that "[c]ourts of the Commonwealth must have the authority to enforce their orders by employing coercive civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained." App. 17a. That court also granted party status to Bagwell so he could "uphold the validity of the subject fines." App. 11a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

A. "Criminal contempt is a crime in the ordinary sense" and "in every fundamental respect." *Bloom v. Illinois*, 391 U.S. 194, 201 (1988). State criminal con-

tempt proceedings must therefore meet the requirements that the Constitution demands for the trial and punishment of crimes, not simply those requirements demanded for the adjudication of civil matters. *Id.* at 201-208 (collecting cases). That being so, a state may not deny a defendant those protections by characterizing as a civil contempt proceeding that which in truth is a criminal contempt proceeding. The instant case presents two questions that are fundamental to the proper characterization of contempt proceedings as civil or criminal in nature.

First, whether a contempt proceeding may be treated as civil in nature—so that none of the constitutional requirements for a criminal contempt proceeding need be followed—where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders.

Second, whether a contempt proceeding may be treated as civil when it generates substantial non-compensatory contempt fines that survive the full settlement of the main civil case solely in order that the court is able to vindicate its own authority.

The Virginia Supreme Court answered those questions "yes." Those answers are contrary to those "principles . . . settled at least in their broad outlines for many decades" that this Court has established to answer the threshold "question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature, for the purposes of applying the Due Process Clause and other provisions of the Constitution." *Hicks v. Feiock,* 485 U.S. 624, 631 (1988). The *Hicks* Court located those "principles" in the leading case of *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 441 (1911), and observed that for the ensuing 77 years

this "Court has consistently applied these principles." 485 U.S. at 631-632.

Nonetheless—as the Virginia Supreme Court's decision here and the decisions of other courts cited therein show—the *lower courts* are going their own quite different way, as if *Gompers* and *Hicks* had never been decided. The result is that the lower courts are treating contempt proceedings that, under the *Gompers* principles, are *criminal* contempt proceedings as *civil* contempt proceedings, to be tried as civil cases rather than criminal cases, without the constitutionally required criminal procedures. While the decision below is singular in its disdain for *Gompers* and *Hicks* as constitutional precedents of binding force, and in the thoroughness with which it does away with criminal contempt proceedings as a class in the Virginia courts, it is otherwise indicative of the dominant trend that is currently running in the lower courts.

This is neither the time nor the place to mince words; those lower court decisions, by making the full force of what have heretofore been deemed to be criminal penalties freely available in civil contempt, create an open season on criminal contempt. Given the wants and needs of claimants and of trial judges, as experience reveals those wants and needs, there is every reason to believe that decisions, like the one below, will in no time make criminal contempt proceedings—and their attendant constitutional requirements—as scarce in the legal world as the California Condor is in the Western sky.

If the test that this Court has determined to be "sound in principle" and "generally" applicable, *Gompers, supra,* 221 U.S. at 443, for safeguarding the constitutional requirements implicated by the contempt power is to be reconsidered, it is for *this Court* to undertake that reconsideration for itself, not for the lower courts to presume to make such a reconsideration on the Court's behalf.

The particulars of this case make it plain that much rides on the maintenance of a proper line of demarcation between criminal contempt and civil contempt. This "civil" contempt proceeding has generated 8 sets of adju-

dications of complex factual questions in which the defendant union was *denied* the constitutional requisites for the trial of a criminal case. The resultant "civil" fines total $52,000,000. Those fines are being pursued even though the parties to the main civil case that generated this "ancillary civil contempt proceeding" have settled their lawsuit and have jointly moved that the Virginia courts vacate all contempt fines as an integral component of that overall settlement. It is difficult to conjure up a larger departure from the constitutional norms declared by this Court, or one that carries with it a larger financial penalty or more long-lived effects.

For all these reasons, this *certiorari* petition should be granted.

B. In addition to—and conceptually quite separate from—the foregoing questions, this case presents a question all but identical to the question presented in *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992), and to the question presented in *Austin v. United States*, No. 92-6073, *cert. granted*, 61 L.W. 3496 (Jan. 15, 1993).

TXO Production—which arises in the context of a punitive damages award in a tort case—and *Austin*—which arises in the context of a civil forfeiture proceeding—ask the Court to decide whether either the Due Process Clause or the Excessive Fines Clause limit non-compensatory civil monetary penalties. For purposes of this constitutional analysis, we submit that there is no viable distinction between non-compensatory civil contempt fines, punitive damages and civil forfeitures. And, by any measure, the $52,000,000 fine here raises at least as substantial questions of compliance with the Due Process Clause and Excessive Fines Clause as the punitive damages award in *TXO Production* or the civil forfeiture order in *Austin*.

Thus, whatever else may happen, Question 3 of this petition should be held for consideration in light of this Court's decisions in *TXO Production* and *Austin*.

I. THE ISSUES CONCERNING THE CONSTITUTIONAL DISTINCTION BETWEEN CIVIL CONTEMPT AND CRIMINAL CONTEMPT

A. The Applicable Constitutional Considerations

It is helpful, we believe, before moving to a consideration of the applicable black letter rules, to return to *Bloom v. Illinois, supra*, and its discussion of the competing considerations that have served to mold those rules.

First of all, "the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates". *Bloom, supra*, 391 U.S. at 201. Given that identity, the path of the law has been to apply the full panoply of the Constitution's criminal law requirements to the prosecution of criminal contempts. Indeed, the *Bloom* Court recognized that the circumstances of criminal contempt present an additional and particularly "compelling argument" for applying the Constitution's "protection against the arbitrary exercise of official power": "Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament"; the contempt power, in other words, "is an 'arbitrary' power which is 'liable to abuse.' " 391 U.S. at 202.

Bloom recognized that, despite these considerations, there is a school of thought that an untrammeled civil contempt power is "necessary to preserve the dignity, independence, and effectiveness of the judicial process," and that the constitutional requirements for the trial and punishment of crimes, when applied to contempt proceedings, undermine paramount "consideration[s] of efficiency" and of "the desirability of vindicating the authority of the court." 391 U.S. at 208. The *Bloom* Court firmly rejected that conception:

> We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of

> all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries. [391 U.S. at 208.]

Nonetheless, with the fewest of exceptions, the lower courts continue to be moved by a felt-need to augment their coercive powers by broadening the realm of civil contempt and by narrowing that of criminal contempt. In the following pages, we detail the nature and extent of that growing resistance to the law as this Court has declared it, together with the conflicting lower court decisions that faithfully implement *Gompers* and *Hicks*. As we show, the dominant trend in the lower courts cannot be squared with a sound respect for this Court's precedents or for the constitutional provisions on which those precedents rest.

B. The Mandatory/Prohibitory Dichotomy

1. *In Gompers v. Buck's Stove & Range Co., supra,* this Court declared that the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added).

The Court explained the basis for this line of demarcation as follows:

> [I]mprisonment for civil contempt is ordered where *the defendant has refused to do an affirmative act* required by the provisions of an order which, either in form or substance, was mandatory in its character.[2]

[2] The *Gompers* Court gave as "examples":

> If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. [221 U.S. at 442.]

> . . . . The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.
>
> On the other hand, if the defendant *does that which he has been commanded not to do*, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. [221 U.S. at 442-43 (citations omitted).]

Then, in *Hicks v. Feiock, supra,* where contempt fines were at issue, the Court reaffirmed this approach:

> If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine *simply by performing the affirmative act required by the court's order.* These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings . . . . [485 U.S. at 632 (emphasis added).]

In sum, civil contempt concerns a party who is subject to a court order *to perform discrete affirmative acts* within a discrete time period specified therein, and the contempt order is to coerce the party to do the act required. *See Gompers, supra,* 221 U.S. at 442.

In contrast, criminal contempt concerns a party who has *engaged in one or more completed acts that constitute a violation of a court order prohibiting those acts,* with the contempt order imposing a punishment on that party for having engaged in those completed prohibited acts. And, that characterization obtains whether

the court is moved by an intent to punish the defendant for violating that order pure and simple, or by an intent to do so in order to coerce the defendant not to engage in repeat violations *in the future*. *See Hicks, supra*, 485 U.S. at 635-36.

2. It should be enough that for 80 years this Court has proceeded on the basis that the mandatory/prohibitory dichotomy is sound in principle and generally states the test that assures against the category of civil contempt and the category of criminal contempt collapsing into each other. But given the stubborn refusal of the lower courts to accept the law as stated in *Gompers* and reaffirmed in *Hicks*, it is the course of prudence to add a few words of elucidation on this dichotomy.

As this Court has recognized, both civil contempt sanctions and criminal contempt sanctions have a "coercive" effect in the general sense of that term. With regard to civil contempt sanctions, the "coercive" effect is, of course, a given. And, with regard to criminal contempt sanctions, there is a "coercive" effect in that those sanctions "tend[] to prevent a repetition of the disobedience." *Hicks, supra*, 485 U.S. at 635-36 (quoting *Gompers, supra*, 221 U.S. at 443). Thus, for the purpose of distinguishing civil contempt and criminal contempt, the term "coercive"—when used in contrast to "punitive"—must have some content beyond "tend[ing] to prevent a repetition of the disobedience." *Id.* The mandatory/prohibitory dichotomy provides that content.

If a judge threatens to impose sanctions for a possible future violation of a prohibitory order, the threatened sanctions "coerce" compliance in the same sense—and only in the same sense—that all legal rules with stated penalties coerce compliance: *viz.*, the coercion takes the form of deterring wrongful acts by defining those acts as wrongful and by threatening punishment for future wrongful acts that may take place. In such circumstances, the only sense in which a party controls his destiny—*viz.* "carries the keys of his prison in his own pocket," *In re Nevitt*, 117 Fed. 448, 451 (8th Cir. 1902)—is the sense in which each member of the general public carries the keys to prison in his own pocket each day of his life: *viz.*, in the sense that each of us is free as long as we do not violate the criminal law.

The coercive threat of sanctions that back up a *mandatory order* is *qualitatively different*. Such a threat leaves the criminal law's area of general deterrence against possible wrongful acts and enters the area of requiring certain specified forms of action.[3] Precisely because this is so, the mandatory/prohibitory dichotomy is the only doctrinal safeguard against the judicial creation of a body of *civil* law that incorporates the criminal law's norms and sanctions while dispensing with the Constitution's requirements for the prosecution and punishment of crimes. Almost without exception, the criminal law consists of prohibitions against "wrongful" action that is to be eschewed (rather than specifications of actions that must be taken) coupled with penalties (imprisonment, fines, or forfeitures) for violations of these prohibitions.

Very simply stated, a contempt proceeding that imposes fines or imprisonment on a party for that party's violation of a previously issued prohibitory injunction is nothing but a *private civil substitute* for what has always been regarded as a *criminal* proceeding covered by the *Constitution's* requirements for such proceedings. Given the significant protection the Constitution provides to a defendant in a criminal proceeding, if civil plaintiffs and trial courts may use a simple and certain means for securing all the benefits of criminal punishments that dispenses with the necessity of a criminal proceeding, there is every reason to believe that they will take advantage of the opportunity thus presented. It is the office of

---

[3] Thus, the distinction between mandatory and prohibitory judicial decrees in the contempt context mirrors the familiar distinction between acts and omissions. *See DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 196 (1989).

the mandatory/prohibitory dichotomy to prevent just such an erosion of the distinction between civil contempts and criminal contempts.

3. Although much of the lower court law in the contempt context is an effort to avoid the teachings of *Gompers* and *Hicks*, a lucid and persuasive counter-example is *In re Contempt of Dougherty*, 429 Mich. 81, 413 N.W.2d 392 (Mich. 1987).[4] In *Dougherty* the Michigan Supreme Court explained that:

> What is apparent from [the Supreme Court] cases is that a coercive sanction is proper where the contemnor, at the time of the contempt hearing, is under a present duty to comply with the order and is in *present violation* of the order.
>
> * * * *
>
> [W]here there is only a past duty to obey the court order, or a present duty, but only a past violation of the order, a coercive sanction is not permissible. It is not a proper sanction because there is nothing to coerce. In fact, defendant is, at the time of the hearing, either in actual compliance with the order, or under no present duty to comply. . . . . [429 Mich. at 99-100, 413 N.W.2d at 399 (emphasis in original).]

The Michigan court then determined that "there was no *act* that could be coerced that would put defendants into compliance with the injunction," and therefore that "the only appropriate sanction for their contemptuous behavior is criminal, after an appropriate criminal proceeding, or a civil order of compensation indemnifying plaintiff for any actual damage or loss it sustained." 429 Mich. at 102, 413 N.W.2d at 400 (emphasis added).

4. The Virginia Supreme Court's decision here is in a different universe of discourse. The court below gave

[4] There, a trial judge found several individuals in civil contempt for twice violating an injunction ordering them not to trespass on, and not to obstruct the entrances to, the grounds of a plant in which cruise missile engines were manufactured. After the Michigan Court of Appeals affirmed, the Supreme Court of Michigan reversed.

the back of its hand to the mandatory/prohibitory dichotomy in two sentences. Neither of its rationalizations for so doing is at all persuasive:

First, the Virginia court opined that the mandatory/prohibitory dichotomy "presents a distinction without a difference." App. 15a.

It is our understanding, however, that it is most emphatically *not* the province of state courts of last resort to reject this Court's teachings with respect to the Federal Constitution's requirements.

Second, the Virginia court relied on a line of cases suggesting that this Court's decision in *United States v. United Mine Workers*, 330 U.S. 258 (1947), rejects the mandatory/prohibitory dichotomy set out in *Gompers* and thereby robs *Gompers* of all vitality.

It is sufficient that this Court does not so understand *Mine Workers*. *Hicks* postdates *Mine Workers* and restates and reaffirms the mandatory/prohibitory dichotomy set forth in *Gompers*. *See, supra*, at p. 11. And *Hicks* does so without betraying the slightest concern that *Mine Workers* can fairly be treated as a conflicting precedent.[5]

[5] It is hardly surprising that *Hicks* does not understand *Mine Workers* to conflict with *Gompers*, for this Court's opinion in *Mine Workers* rests on and applies the mandatory/prohibitory dichotomy set out in *Gompers*. At the time the coercive civil contempt fines at issue in *Mine Workers* were imposed, the United Mine Workers was in violation of a trial court's orders requiring the Union to take certain steps toward bringing about the cessation of an unlawful strike. This Court read that order as imposing on the Union the obligation to take the following discrete, affirmative acts the doing of which would avoid the imposition of the fines:

> [a] by withdrawing unconditionally the notice given by it, signed John L. Lewis, President, on November 15, 1946, to J.A. Krug, Secretary of the Interior, terminating the Krug-Lewis agreement as of twelve o'clock midnight, Wednesday, November 20, 1946, and [b] by notifying, at the same time, its members of such withdrawal in substantially the same manner as the members of the defendant union were notified of the notice to the Secretary of the Interior above-mentioned; and [c] by withdrawing and similarly instructing the members

5. For the reasons just given, we submit that *Gompers* and *Hicks* establish a mandatory/prohibitory dichotomy in the terms set out above. Be that as it may, it is even plainer that this Court's decisions cannot be read as permitting a test for determining whether a contempt proceeding is civil or criminal that disregards the nature of the underlying judicial decree. *See supra,* at pp. 10-11, quoting and discussing *Gompers, supra,* 221 U.S. at 443, and *Hicks, supra,* 485 U.S. at 632. Yet, as the decision of the Virginia Supreme Court shows, the lower courts are dispensing with the part of the *Gompers-Hicks* inquiry devoted to whether the underlying decree at issue is mandatory or prohibitory, offering as justification that the mandatory/prohibitory dichotomy "was not intended to be a dispositive test," *Latrobe Steel Co. v. United Steelworkers,* 545 F.2d 1336, 1343 n.27 (3d Cir. 1976), or that it is "of little utility," *Shakman v. Democratic Organization,* 533 F.2d 344, 349 n.7 (7th Cir. 1976).

Those courts confine themselves to a surface inquiry in which only the *form* of the *contempt order itself* is examined: If that order is entered prior to a party's violation of a court's decree and is stated in a conditional form—*viz.,* is stated as "*if a* defendant does or fails to do a certain act, *then* the following sanction will be imposed"—the order is deemed to fall within the area covered by civil contempt. In contrast, if the contempt order is entered after the fact and sets a fine or imprisonment for the violation, the order falls within the area covered by criminal contempt.

---

of the defendant union of the withdrawal of any other notice to the effect that the Krug-Lewis agreement is not in full force and effect until the final determination of the basic issues arising under the said agreement. [330 U.S. at 305.]

Thus, this Court made clear that the United Mine Workers and its officers were not subject to a broad prohibitory order—*e.g.,* do not strike—but rather to a mandatory order requiring that the Union and its officers undertake to perform certain discrete, affirmative acts in order to purge themselves of civil contempt.

A line of recent cases arising out of anti-abortion demonstrations is illustrative. For example, in *Aradia Women's Health Center v. Operation Rescue,* 929 F.2d 530 (9th Cir. 1991), the trial judge enjoined the defendants and any person acting in concert with the defendants "from blocking access to abortion facilities and other activities in the state," and "provided for sanctions of $500 for each prospective violation of the order," *id.* at 531. Defendants violated this order, and the trial judge held them in civil contempt.

On appeal, the Ninth Circuit acknowledged this Court's instruction in *Hicks* that a contempt fine is civil "when the defendant can avoid paying the fine simply by performing the . . . *act required by the court's order,*" 929 F.2d at 532 (emphasis added). But the Ninth Circuit determined that defendants had "committed the *act* that subjected them to contempt by *failing to comply with the court's prospective order,*" *id.* at 532, and thus held that the trial judge had properly proceeded in civil contempt, *id.* Such verbal sleight of hand—through which a failure-to-comply with a prohibition is somehow transmuted into the failure to do an affirmative act commanded—empties the mandatory/prohibitory dichotomy of meaning and robs the *Gompers* test of its content.

Other lower court decisions have adopted the same strategem. *See, e.g., Roe v. Operation Rescue,* 919 F.2d 857, 869 (3d Cir. 1990) (trial judge appropriately enforced a prohibitory order in civil contempt because "the contemnors' obligation to pay these fines was contingent on a future violation of its orders"); *N.Y. State National Organization for Women v. Terry,* 886 F.2d 1339, 1351 (2d Cir. 1989), *cert. denied,* 495 U.S. 947 (1990) (trial judge appropriately enforced a prohibitory order in civil contempt because "[t]he prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights"); *Lovejoy Specialty Hosp. v. Advocates for*

Life, Inc., 802 P.2d 684 (Or. App. 1990), *pet. rev. dismissed as moot*, 814 P.2d 511 (Or. 1991) (same).[6]

In practical terms, this burgeoning rule—that, even where a prohibitory decree is being enforced, the contempt is civil if the surface form of the order imposing contempt sanctions is conditional—shrinks criminal contempt to the verge of invisibility. To avoid the inconvenience of meeting the Constitution's requirements for criminal cases, all that a judge need do is announce in advance that, if his decree is violated, he will impose a fine or a jail sentence. Doing so transforms all sanctions imposed for any subsequent disobedience into civil contempt sanctions. The lower courts' creation of this rule—which trivializes this Court's precedents and the important constitutional interests these precedents implement—calls for for this Court's review.

[6] Some lower courts that have refused to follow *Gompers* and *Hicks* have also followed slightly different strategems.

First, some courts that disregard the mandatory/prohibitory dichotomy state the test to be whether the trial judge's *true* purpose in imposing contempt sanctions was primarily to coerce or to punish. The Virginia Supreme Court relied heavily on the trial judge's own statements of his purpose in imposing contempt fines. *See, e.g.*, App. 13a-15a (quoting trial judge's explanation of reasons for the imposition of the contempt fines and relying on "the trial court's clear intent"). *See also, e.g., Latrobe Steel Co., supra*, 545 F.2d at 1344 & n.41; *Shakman, supra*, 533 F.2d at 349-50.

But this negation of mandatory/prohibitory dichotomy is as contrary to *Gompers* and *Hicks* as its formalistic counterpart. In *Hicks*, this Court condemned just such an inquiry into a judge's subjective purpose in imposing contempt sanctions: "Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided." 485 U.S. at 635.

Second, other courts reach results that cannot be squared with *Gompers* and *Hicks* through opinions that do not make clear the basis for their divergence. *E.g., Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976); *NLRB v. Truck Drivers & Helpers*, 450 F.2d 413 (3d Cir. 1971); *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411 (Vt. 1992); *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655 (1953); *People v. Batey*, 228 Cal. Rptr. 787 (Cal. App. 1986), *cert. denied*, 480 U.S. 932 (1987).

C. The Continued, Public Prosecution of "Civil" Contempt Orders After The Final Settlement Of The Main Civil Action

The contempt fines at issue come out of contempt proceedings that were instituted at the motion, and for the benefit, of private civil complainants; these proceedings were styled civil proceedings ancillary to the main civil action. Nevertheless, the trial court and the Virginia Supreme Court refused to allow the private civil parties, by joint motion, to terminate the contempt proceedings and to vacate the contempt fines. Instead, the trial court responded to that motion by appointing a special commissioner and charging him with defending the contempt judgments on appeal and instituting all further actions necessary to collect the accumulated contempt fines.

The Virginia Supreme Court affirmed these trial court orders, reasoning that regardless of the wishes or interests of the private civil parties who initially sought contempt, "[c]ourts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained." App. 17a.

In this regard, as in the regard addressed in part B above, the decision below conflicts with this Court's *Gompers* decision and with *Gompers'* progeny. And, once again, in this regard the decision illustrates a growing trend of decisions that, misconstruing or ignoring *Gompers*, extends civil contempt deep into the area covered by criminal contempt.

1.(a) *Gompers* involved a challenge to a contempt order that imposed a term of imprisonment and a monetary obligation on a group of labor leaders at the motion of a company that had brought a civil action against those leaders and their labor organization for conducting an unlawful labor boycott. The company had obtained an injunction against the boycott, the labor leaders had violated the injunction, and the company sought relief

through civil contempt for such violations. After the trial court held defendants in contempt and determined the proper contempt penalties, but before the penalties were actually enforced, the parties in *Gompers*—like the parties here—reached a full settlement of all disputes and all litigation between them.

On the basis of that settlement, and in light of the nature of civil contempt, the *Gompers* Court held that: "*When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled.*" 221 U.S. at 451 (emphasis added). Any proceeding to enforce previously imposed civil contempt penalties thus "necessary ended with the settlement of the main cause of which it is a part." *Id.* at 452.

The *Gompers* Court could not have been more plain that the interest in the vindication of the trial court's authority *cannot* justify the continued enforcement of *civil* contempt after settlement of the main case. Rather, vindication of that interest is the province of *criminal contempt*, which the Court contrasted with civil contempt in the following way: "If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation." 221 U.S. at 451 (internal citations omitted).[7]

[7] Consistent with all of the foregoing, in *Leman v. Krentler-Arnold Hinge Last Company*, 284 U.S. 448 (1932), this Court explained *Gompers* as follows:

> The question of the relation of [a civil contempt] proceeding to the main suit was fully considered in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, and it was determined that the [civil contempt] proceeding was not to be regarded as an independent one, but as a part of the original cause. . . . The distinction was made in this respect between such proceedings and those at law for criminal contempt which "are between the public and the defendant, and are not a part of the original cause." In the *Gompers* Case . . . as there had been a complete settlement of all matters involved in the equity suit, the contempt proceeding was necessarily ended. . . . [284 U.S. at 452-53.]

See also United States v. United Mine Workers, supra, 330 U.S. at 295 n.61 (1947).

We are aware of no decision in this Court in the years since *Gompers* that has in any way called this aspect of *Gompers* into question.

(b) The decision below, which clothes civil contempt orders with the precise attribute *Gompers* holds is unique to criminal contempt orders—*viz.*, the capacity to survive a full private settlement—is clearly contrary to *Gompers*. The entirety of the Virginia Supreme Court's effort to distinguish *Gompers* in this regard is that court's brief assertion that the monetary relief at issue in *Gompers* was "compensatory relief to be paid to the complainant," so that *Gompers* did not involve "coercive, civil contempt sanctions." App. 18a.

The *Gompers* opinion, however, does not even hint that a distinction between different kinds of civil contempts should make a difference regarding the ability of the parties to settle their dispute. To the contrary, *Gompers* rests its conclusion regarding the effect of settlement on the proposition that civil contempt—as distinct from criminal contempt—is a "remedial" proceeding, "for the benefit of the complainant," and *not* a proceeding "to vindicate the authority of the court":

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, *and for the benefit of the complainant.* But if it is for criminal contempt the sentence is punitive, *to vindicate the authority of the court.* [221 U.S. at 441 (emphasis added).]

And, the *Gompers* Court made it quite clear that this distinction obtains where the civil contempt order can be termed "coercive" and where it can be termed "compensatory." Such a "coercive" civil contempt order is "not inflicted as a punishment, but is intended to be remedial by

coercing the defendant to do what he had refused to do" and thereby benefiting the civil complainant. 221 U.S. at 442.[8]

Once again, this Court has never questioned this aspect of *Gompers*.[9]

(c) The conflict between the decision below and *Gompers* is vividly illustrated by the decisions of the trial court to appoint a special commissioner and to charge him with further prosecution of the contempt fines here at issue, and by the decision of the Virginia Supreme Court to affirm those trial court decisions and to grant that court-appointed officer party status.

Gompers explained that a civil contempt proceeding—as a proceeding that serves "remedial [ends] . . . for the benefit of the complainant"—is "instituted, entitled, tried, and up to the moment of sentence, treated as a part of the original cause in equity." 221 U.S. at 445. In such a proceeding, the civil complainant is "not only the nominal, but the actual, party on the one side, with the defendants on the other"; the civil complainant is acting "in its own right in an equity cause, and not as a representative of the [government] prosecuting a case of criminal contempt." *Id.*

In contrast, a criminal contempt proceeding—as a proceeding designed "to vindicate the authority of the court" —is normally "a separate action, one personal to the defendants, with the defendants on one side and the court

---

[8] *See also Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599, 604-605 (1907); *Bessette v. W. B. Conkley*, 194 U.S. 324, 328 (1904); *In re Nevitt, supra*, 117 Fed. at 458-59.

[9] *See Shillitani v. United States*, 384 U.S. 364, 368 (1966) (civil contempt "is essentially a civil remedy designed for the benefit of other parties"); *Penfield v. SEC*, 330 U.S. 585, 590 (1947) (*citing Gompers* for proposition that punishment for civil contempt, "is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public"); *McCrone v. United States*, 307 U.S. 61, 64 (1939) (same); *see also Hicks, supra*, 458 U.S. at 63 (*citing Gompers*).

vindicating its authority on the other." 221 U.S. at 442 (*quoting* the lower court's *Gompers* decision).

The criminal nature of the proceedings at issue here is thus amply demonstrated by the fact that the courts below, finding the normal structure of civil litigation inadequate to their purposes, created a new structure that, in its essence, follows the criminal contempt model. Because the civil complainants had no continuing interest in enforcing the fines, the trial court took from them their right to control prosecution of their litigation, appointing a special commissioner to prosecute the contempt fines, all to vindicate *the court's* interests.[10]

2. The decision below is in conflict with numerous lower court decisions involving settlement agreements.

(a) For example, the Wisconsin Supreme Court, in an opinion containing an extensive quotation and discussion of *Gompers*, concluded:

> Usually a contempt action which seeks to vindicate the authority and dignity of the court is a criminal contempt, while a contempt which seeks to enforce a private right of one of the parties in an action is a civil contempt. The distinction is often expressed in the results which flow from the particular finding of contempt. If the order is coercive or remedial, the contempt is civil. If the order is purely punitive, the contempt is criminal. . . . In *Gompers*, the United

---

[10] Such an arrangement, although styled a part of the initial litigation is, in its substance, a separate piece of litigation. The arrangement certainly does not correspond to the normal structure of civil proceedings. *See Webster Eisenlohr v. Kalodner*, 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) (courts may not generally appoint special masters in a civil case to pursue goals beyond those that the parties choose to litigate). Rather, it follows what *Gompers* described as the normal structure of criminal contempt proceedings: *viz*, "a separate action . . . with the defendants on one side and the court vindicating its authority on the other." *Gompers, supra*, 221 U.S. at 442. *See also Young v. Vuitton*, 481 U.S. 787 (1987) (a court may exercise *criminal* contempt authority by appointing a special prosecutor to prosecute one of the civil parties for criminal contempt).

States Supreme Court held that settlement of the underlying controversy required dismissal of civil contempt grounded in that controversy. Thus, under this rule, civil contempt begun before or, as here, after the settlement of the underlying dispute, is moot because it cannot achieve a coercive or remedial effect. [*State v. King*, 82 Wis. 2d. 124, 262 N.W. 2d 80, 82, 84 (1978) (internal citations omitted).] [11]

(b) The decision below also conflicts with another line of federal cases, which has followed *Gompers'* reasoning outside the context of settlement agreements. These cases stand for two propositions that cannot be squared with the decision below: *first*, that civil contempt proceedings and orders must terminate if the civil complainant *for any reason* (whether due to settlement or otherwise) becomes disentitled to the benefits of the contempt proceedings that the complainant has instituted; and, *second*, that in such circumstances, the court's interest in vindicating its own authority cannot, by itself, sustain a civil contempt.[12]

---

[11] Other decisions, with similar facts, reach the same conclusion. *See, e.g., Flight Engineers v. Eastern Air Lines*, 301 F.2d 756 (5th Cir. 1962); *Blake Associates v. Omni Spectra*, 118 F.R.D. 283, 293 (D. Mass. 1988); *General Electric Co. v. Seltzer*, 161 F. Supp. 200, 201-202 (D. Del. 1958); *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.*, 92 F. Supp. 352, 357 (D. Minn. 1950); *White v. Lombardy Dresses*, 48 F. Supp. 730, 731-32 (S.D.N.Y. 1942); *Kerl v. Hofer*, 4 Wash. App. 559, 482 P.2d 806, 809-10 (1971) *De Rienzo v. Borrelli*, 178 Misc. 752, 36 N.Y.S. 2d 641 (1942); *Hess v. Finn*, 176 Misc. 407, 27 N.Y.S. 2d 80 (1941).

[12] These propositions are not only consistent with *Gompers*, but with this Court's related rule that *civil* contempt penalties terminate —regardless of any need to vindicate the court's authority—if the legal theories underlying the violated injunction prove without merit. *See, e.g., United States v. United Mine Workers, supra*, 330 U.S. at 295 & n.61; *Worden v. Searles*, 121 U.S. 27, 30 (1887).

In contrast, this Court's rule is that a *criminal* contempt penalty may normally be enforced regardless of the merits of the legal theories underlying the violated injunction. *See, e.g., Maness v. Meyers*, 419 U.S. 449, 458-59 (1975); *Walker v. Birmingham*, 388 U.S. 307 (1967).

For example, the Second Circuit, in *Lasky v. Quinlan*, 558 F.2d 1133 (1977), dismissed civil contempt fines in a context—where the complainants, who had been jail inmates when they initiated proceedings to improve jail conditions, had each been released from jail subsequent to obtaining the contempt orders—that is logically indistinguishable from the instant case.[13]

The Second Circuit held that because "there [was] no longer any party to the [civil] action having an interest in the enforcement" of the contempt fines, those fines must be dismissed. *Id.* at 1136. And, in a passage that could not be more relevant here—and could not be more clearly in conflict with the decision below—the Court of Appeals added:

> Finally, while it may be argued that the Court itself has an interest in assuring that litigants comply with its orders, it is well established that a civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court. [358 F.2d at 137 (internal quotation marks and citations omitted).][14]

---

[13] *Lasky* involved coercive civil contempt fines, payable to the court, that the court imposed on a county sheriff for his repeated failure to comply with court orders to improve jail conditions. As here, subsequent to the imposition of the fines but prior to their collection, the civil complainants who had sought the contempt orders had become disentitled to any further relief.

[14] *See also In Re Grand Jury Proceedings*, 574 F.2d 445, 446-47 (8th Cir. 1978) (vacating a civil contempt order issued to coerce compliance with a subpoena, because the subpoena had been withdrawn: "[t]he purpose of a civil contempt order is to provide a remedy for one of the parties" and "[i]f the complaining party is no longer entitled to the benefit of the contempt order, the contempt proceeding should be terminated"); *WMATA v. ATU Local 689*, 531 F.2d 617, 622 (D.C. Cir. 1976) (court could not impose civil contempt fines *sua sponte* after civil complainant obtained contempt finding and then abandoned case, because "in the civil contempt setting, the court has no independent interest in vindicating its

3. At the same time, the decision below is part of a recent trend in the lower courts to abandon the *Gompers* view and to adopt the view that coercive civil contempt orders may rest *entirely* on the trial court's interest in vindicating its own authority, independent of any interest of the civil complainant.

This recent line of authority not only conflicts with prior decisions of this Court—and many other courts—regarding the differences in character and purpose between civil and criminal contempt, it also undermines the constitutional rights of contempt defendants by permitting the courts to employ civil contempt to pursue no purpose other than *the* purpose—vindicating the court's authority—that criminal contempt serves to vindicate.

(a) The Virginia Supreme Court cited two federal court of appeals decisions for the proposition that a court's interest in vindicating its own authority can—standing independent of the interests or desires of any civil complainant—be the basis for continuing coercive civil contempt proceedings. *See* App. 17a (citing *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 113 (1981); *United States v. Work Wear*

---

authority should its orders be violated"); *MacNeil v. United States*, 236 F.2d 149, 154 (1st Cir. 1956), *cert. denied*, 352 U.S. 912 (1956) ("trial court can have only a public, as distinguished from private, interest in the enforcement of its own decrees" and therefore "any action of contempt initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and punishment of a public wrong"); *United States v. International Union, United Mine Workers*, 190 F.2d 865, 873 (D.C. Cir. 1951) ("civil contempt proceeding is wholly remedial . . . not to deter offenses against the public or to vindicate the authority of the court"); *Parker v. United States*, 153 F.2d 66, 71 (1st Cir. 1946) ("civil contempt proceeding must be terminated" once a complainant becomes "disentitled to the further benefit of [a civil contempt] order," because a court has no such interest in maintaining in force its order").

Corp., 602 F.2d 110 (6th Cir. 1979)). These two decisions do aptly illustrate the trend noted above.[15]

Criden involved a journalist who was jailed for civil contempt at the motion of the United States because she refused to answer certain questions in the pretrial hearing of a criminal case. When the judge closed the record of the hearing, the contemnor moved to vacate her contempt on the basis that she could no longer submit testimony, so that the complaining party could no longer derive benefit from her confinement. The trial court denied her motion.

In affirming this judgment, the Third Circuit found the journalist's assertion that she could no longer submit testimony to be factually inaccurate, since the trial court was willing to reopen the hearing and the testimony. But that court went further and held that continued imprisonment under the civil contempt order was justified regardless of whether the defendant's testimony was still needed. This was so because "[s]anctions for civil contempt may be used . . . to coerce the defendant into compliance with the court's order, thereby vindicating the court's institutional authority." 633 F.2d at 352.[16]

In *Work Wear Corp.*, the Sixth Circuit upheld a district judge's refusal to reduce a civil contempt fine despite

---

[15] For other recent decisions that are similar to *Criden* and *Work Wear*, *see SEC v. American Board of Trade*, 830 F.2d 431, 441 (2d Cir. 1987), *cert. denied*, 485 U.S. 938 (1988) (affirming trial court's *sua sponte* initiation of civil contempt proceedings and imposition of civil contempt fines despite admission that "we have found no case permitting such a practice"); *Clark v. International Union, United Mine Workers*, 752 F. Supp. 1291, 1298-1301 (W.D. Va. 1990) (district court *sua sponte* initiating civil contempt proceedings, imposing fines, and holding that such fines survive settlement of underlying civil litigation).

[16] In the *Criden* court's view, allowing a contemnor to escape a court's civil contempt sanction whenever the initial complaining party no longer needs or wants the performance at issue, would relegate the district court to "the role [of] . . . a hired umpire dragged in from the street to preside over a dispute between private litigants." *Id.*

the stipulation of all parties to the civil litigation that the fine be reduced. The court of appeals reasoned that the "contempt sanction imposed was . . . designed to secure compliance with and respect for the court's order"; this was an interest of the court that civil parties could not waive. 602 F.2d at 115. The court of appeals reasoned that although the contempt at issue was civil, "there is no bright dividing line between civil and criminal contempt," and "[v]indication of judicial authority is [an interest] present in both." *Id.*[17]

While the court below is quite right that its decision is consistent with this recent line of decisions, neither its decision, nor the decisions it cited, are consistent with the decisions of this Court or the many decisions of other courts that we have cited. This conflict over *Gompers*' meaning—which goes to the essential natures of civil contempt and criminal contempt—is one that has reached a dimension calling for this Court's intervention.

III. THE EXCESSIVE FINES ISSUES

The Virginia Supreme Court rejected the contention that the civil contempt fines of $52,000,000 ordered by the trial judge here are so excessive that their imposition violates both the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth

[17] The principal precedents of this Court that *Criden* and *Work Wear* cite for their view of coercive civil contempt are *Hutto v. Finney*, 437 U.S. 678, 691 (1978) and *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977). *See, e.g., United States v. Criden, supra*, 633 F.2d at 352 & n.2; *Work Wear, supra*, 602 F.2d at 115. Neither *Hutto* nor *Juidice* were cases involving civil or criminal contempts, and neither purported in any way to call into question any aspects of this Court's previously established jurisprudence in the contempt area. The cited *dicta* in *Hutto* and *Juidice* are nothing more than general statements that civil contempt sanctions, which are remedial in nature, may serve to vindicate the court's authority *at the same time* as serving the relevant private interests. That point does not in any way support the proposition that civil contempt proceedings can be pursued *solely* to vindicate the authority of a court, wholly independent of any private remedial purposes. *See Gompers, supra*, 221 U.S. at 443.

Amendment. This Court is presently considering two cases which present the same constitutional issues.

In *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, *cert. granted*, 61 L.W. 3400 (Nov. 30, 1992), the Court will determine whether a state's imposition of a $10 million punitive damages award for conduct that caused only modest financial injury violates substantive due process.[18] And, in *Austin v. United States*, No. 92-6073, *cert. denied*, 61 L.W. 3496 (Jan. 15, 1993), this Court will decide whether the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture actions brought by the government, and, if so, state the test for determining when a civil penalty is unconstitutionally excessive.[19]

Punitive damages awards in tort cases and civil forfeiture orders, like the "civil contempt" fines which are at issue here, are intended to operate as deterrents to identified wrongful behavior that also might, but need not, have risen to the level of criminal conduct. The amount of such civil penalties is not intended to compensate any victims of wrongdoing; the purpose is to coerce future compliance with a particular legal norm. Because all three of these civil penalties serve a single office in our system of civil justice, all three should be subject to the same constitutional safeguards.

[18] Specifically, the Court granted *certiorari* to decide, *inter alia*, the following question: "Did excessive and disproportionate nature of $10 million punitive damages award violate potential lessor's substantive due process rights?" 61 L.W. 3320 (Nov. 30, 1992).

[19] Specifically, the Court granted *certiorari* to address the following questions: (1) "Should concepts of proportionality arising from the Eighth Amendment be applied to forfeiture of property under 21 U.S.C. § 881(a)(4) and (a)(7)?"; (2) "When showing is made that the forfeiture of property is excessive, must government show that interest ordered forfeited is not so grossly disproportionate to offense committed by property owner as to violate Eighth Amendment's prohibitions of cruel and unusual punishment and excessive fines?" 61 L.W. 3516 (Jan. 26, 1993).

In this action, the Virginia Supreme Court held that a government agent may seek—absent *any* claim of compensatory damages and against the will of both parties—to collect civil contempt fines of $52,000,000, clearly among the largest civil contempt fines ever levied.[20] If there is ever to be a case in which the Constitution would condemn a civil penalty as so grossly excessive as to amount to a violation of the Due Process Clause or Excessive Fine Clause, this is that case.

Thus, *TXO Production* and *Austin* potentially affect the instant petition, which should, at a minimum, be held pending the issuance of the decisions in those cases.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. STROPP, JR.
900 15th Street, N.W.
Washington, D.C. 20005

JOHN R. MOONEY
1341 G Street, N.W.
Washington, D.C. 20005

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:

ANDREW P. MILLER
2101 L Street, N.W.
Washington, D.C. 20037

VIRGINIA A. SEITZ
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

---

[20] We have examined all cases classified under the West Key Number System as Contempt 75 (Amount of Fine) and discovered no case imposing a civil contempt sanction equal to or in excess of $52 million. We have been informed by the United States Department of Justice that the United States does not compile statistics related to the amounts of civil contempt fines, and is not aware of any other entity which might do so.